

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 502 of 2021

IN THE MATTER OF:

Anand Natvarlal Khant

27, Pratibha Row House
Nr. Saraswati Vidhyalay
New Palanpur Road
Surat – 395009.
Gujarat.

...Appellant

Versus

Kush Structure Pvt. Ltd.

Shop No. 9
Pancham Residency
Opp. Karan Park Row House
Adajan, Surat – 395009
Gujarat.

...Respondent

For Appellants: Ms. Ranu Purohit, Mr. Pradhuman Gohil, Ms. Tanya Srivastava and Ms. Jasleen Bindra, Advocates.

For Respondent: Mr. Purvish Malkan, Advocate.

ORDER
(Virtual Mode)

23.07.2021: This Appeal has been filed by the Appellant – Operational Creditor against the impugned order passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, Court 2 vide impugned order passed in C.P. (IB) No. 605/NCLT/AHM/2018 Dated 5th April, 2021.

2. Heard Learned Counsel for the Appellant. The Learned Counsel refers to the Construction Agreement between the Appellant and Respondent – Corporate Debtor dated 27th October, 2017, copy of which is at page 210. She refers to

contents at page 215 with regard to 'particulars of payment'. According to Learned Counsel there was an agreement between the Appellant and the Respondent – Corporate Debtor for carrying out construction and the Respondent was to pay 20% on receiving cheque from the Government. The Learned Counsel then refers to document at page 228 (Annexure-7) which is Police Statement dated 17th June, 2021 and contents therein at page 230 and 231 of the appeal and submits that the Respondent accepted that amounts were received from the Government and not paid to the Appellant 20% of the amount as per the Agreement. Thus, it is submitted that there was debt due and default for which application under Section 9 of Insolvency and Bankruptcy Code, 2016 (for short 'IBC') was filed.

3. The Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, Court 2 vide impugned order passed in C.P. (IB) No. 605/NCLT/AHM/2018 dated 5th April, 2021, after hearing parties, has passed the following order:-

“12. Gone through the records and also seen the documents. The applicant claimed to have entered into an agreement with respondent for construction work Dang, Ahwa, Government School contract at village Ambapada. Admittedly, the construction work was awarded to the corporate debtor and the corporate debtor is to receive payment from the Government for the said construction.

13. On perusal of the application, i.e. Form 'V' meant for operational creditor, Part IV, Clause 1 and 2, the operational creditor categorically mentioned about invoice/bill/debit note, which are not annexed with the application. However, the said clause-2 read as under:-

“The total amount of receivable/total amount of debt is INR29,00,000/-, not including interest on the principal

sum calculated at the rate of 18% per annum from the respective due date of the invoice/debit note. Such interest at the rate of 18% per annum is due to be payable till payment and/ or realization.”

However, no bill or invoice either annexed with the demand notice or with the application. Hence, it is difficult to make out as to which is the ‘due’ date and/or date of ‘default’. There is also mention of ‘debit’ note, but the same not annexed along with the application.

14. *Further, applicant has totally failed to prove that he falls under the category of operational creditor. It is to be mention herein that to fall under the definition of operational creditor, the claim must be in the respect of the provisions of goods or services including employment or debt in respect of the dues arising under any law for the time being in force. On perusal of the record it is found that, no service has been provided to the corporate debtor at any point of time by the operational creditor save and except an agreement entered between both sides, as claimed. However, for the sake of convenience, Section 5(21) of the IB Code is reproduced hereunder:-*

“operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”

15. *To attract the provision of IB Code under Section 9, there must be ‘due’ and ‘default’ which is found absent in the instant application. The instant application is also not complete as the due date and default date is not provided, even no invoices are annexed or ever raised upon corporate debtor. In absence of such primary information, it is difficult to come to the conclusion that the amount claimed is operational debt, hence, the application is dismissed. No order as to costs.*
16. *However, the findings or observations made in this order shall not come in the way of the applicant/ petitioner to approach any other forum/competent authority or any appropriate court of competent jurisdiction for recovery of any claim or as the case may be.”*

4. We have asked the Learned Counsel to show as to what was the notice sent under Section 8 of the IBC. Notice pointed out is at page 268 of the Appeal. With regard to the particulars of the operational debt what is mentioned is as under:-

PARTICULARS OF THE OPERATIONAL DEBT		
1.	<p><i>Total amount of debt, details of transactions on account of which debt fell due, and the date from which the debt fell due.</i></p>	<p><i>Total amount of receivable / total amount of debt is INR 29,00,000/-, not including interest on the principal sum calculated at the rate of 18% per annum from the respective due date of the invoice/bill. Such interest at the rate of 18% per annum is due to be payable till payment and/ or realization.</i></p> <p><i>The principal amount is payable under the Construction Agreement dated 17.11.2017 whereunder Kush Structure was obligated to undertake construction work for the Dang Ahwa, Government School Contract, at Villages Borkhal, Piplada and Sakarpatal. Kush Structure was to receive from the Government the payment for the aforesaid construction work and under the aforesaid Construction Agreement. Kush Structure agreed to pay to Mr. Anand Natvarlal 20% of the amounts received from the Government.</i></p> <p><i>Kush Structure has from time to time acknowledged the receipt of funds from the Government, but has not yet paid the 20% sum due to Mr. Anand Natvarlal under the Construction Agreement dated 17.11.2017 amounting to Rs.29,00,000/-, not including interest on the principal sum calculated at the rate of 18% per annum from the respective due date of the invoice/debit note. Such interest at the rate of 18% per annum is due to be payable till payment and/or realization.</i></p>

5. On the above basis the amount of default is calculated and Section 9 application was filed and it is claimed that the Appellant is entitled to 20% of the amount received by the Respondent under the Construction Agreement.

6. We find substance in finding of the Adjudicating Authority that there was no material of service rendered. The Section 8 notice relied on also does not show material as to service rendered. Under the provisions of IBC, to be an Operational Creditor it is necessary to show that there is an operational debt which has to be a claim with regard to provision of goods or services. These important ingredients are missing in the present matter. We, thus, decline to interfere with the impugned order or admit the Appeal. The Appellant has been granted liberty to approach appropriate forum by the Adjudicating Authority. Appellant will be further at liberty to file another application under Section 9 of IBC after following appropriate procedure, if so advised.

7. We dispose of the Appeal accordingly. No cost.

**[Justice A.I.S. Cheema]
The Officiating Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

Archana/gc.